**The Hoover Company *and* International Brotherhood of Electrical Workers, AFL–CIO, Local No. 1985.** Case 8–CA–23035

May 15, 1992

## DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On September 30, 1991, Administrative Law Judge John H. West issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.[1]

## ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The judge relied on, inter alia, *Motor Convoy*, 303 NLRB 135 (1991), a case in which Chairman Stephens and Member Oviatt dissented. They note, however, that factors that led them to dissent in *Motor Convoy*—for example, an issue concerning the *legality* of the contract clause construed in the arbitration award—are not present here, and that the decision here is fully in accord with relevant Board precedent. See, e.g., *Dennison National Co*., 296 NLRB 169 (1989).

*Melvin E. Feinberg, Esq.* and *Christine Hoffer, Esq.*, for the General Counsel.

*John D. Jolliffe, Esq. and G. Randall Ayers, Esq. (Black, McCuskey, Souers & Arbaugh)*, of Canton, Ohio, for the Respondent.

*William Gore, Esq.*, of Akron, Ohio, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. Upon a charge filed September 12, 1990, by the International Brotherhood of Electrical Workers, AFL–CIO, Local No. 1985 (Union) against The Hoover Company (Respondent), a complaint was issued February 27, 1991, alleging that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act (Act) in that Respondent refused the Union's March 28, 1990 request to negotiate concerning Respondent's proposed changes to its no-smoking policy, which allegedly is a mandatory subject of bargaining, and on September 9, 1990, Respondent unilaterally, without bargaining with the Union, implemented a no-smoking policy. In its answer, Respondent admits that it unilaterally and without bargaining implemented the proposed change to a specified work rule. It denies that this was a mandatory subject of bargaining and it asserts that had it been, any such bargaining duty was waived by the Union and precluded by collateral estoppel and precedent of the National Labor Relations Board (Board).

A hearing was held in Canton, Ohio, on June 25, 1991. Upon the entire record in this case, including my observation of the demeanor of witnesses and consideration of the briefs of General Counsel and the Respondent, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

Respondent, a Delaware corporation with an office and place of business in North Canton, Ohio, has been engaged in the manufacture of household cleaning appliances. The complaint alleges, the Respondent admits, and I find that at all times material herein, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

#### II. THE ALLEGED UNFAIR LABOR PRACTICES

There has been a collective-bargaining relationship between the Respondent and the Union for over 20 years. The current collective-bargaining agreement is effective from July 8, 1988, to June 1, 1992. (Jt. Exh. 4.)

When the Respondent mentioned during the 1988 contract negotiations that it would be implementing a no-smoking policy in the future the Union indicated its opposition and a desire to bargain over this at the appropriate time.[1]

On January 2, 1990, Respondent implemented a smoking ban for all salaried employees.

Also in January 1990 James Cook, Respondent's industrial relations manager in North Canton, informed union representatives that the Company was going to implement a no-smoking rule. Once again the Union indicated that it would not go along with such a rule.

On February 27, 1990, Respondent told the Union that the Company would be implementing a no-smoking rule which would ban smoking in all areas of the plant, except the employee parking lots, and that the disciplinary action for the violation of the rule, which is set out in the Hourly Employee Handbook, would be modified.[2] As indicated in Gen-

[1] At that time, Respondent's Hourly Employees Handbook, Jt. Exh. 5, contained the following:

SMOKING

In certain areas of the Plant employees are permitted to smoke while at work. There are restricted areas plainly marked by appropriate ''NO SMOKING'' signs in which no smoking is permitted. Matches, ashes and stubs must be deposited in the proper receptacles provided for this purpose.

The continuation of the smoking privileges during working hours is dependent upon the observance of safe smoking habits by employees. The Company will from time to time establish additional restricted areas and change existing restricted areas.

RULE #22

Smoking in prohibited areas.
1st OFFENSE—Warning
2nd OFFENSE—One Week's Suspension
3rd OFFENSE—Discharge

[2] The handbook was eventually modified, Jt. Exh. 6, to read as follows:

eral Counsel's Exhibit 2, the smoking ban, except in parking lots, was to become effective on June 11, 1990.

On March 28, 1990, James Repace, then president and business manager of the Union, forwarded a letter (Jt. Exh. 1), to Cook indicating a desire ''to enter into negotiations for the sole purpose of negotiating this no smoking policy.'' By letter dated March 28, 1990 (Jt. Exh. 2), Cook replied to Repace, in part, as follows:

> As you know, this is a factory rule change and is covered by Management Rights Paragraph 18, Page 8, of the current labor contract.
>
> Factory rules and regulations are not subject to negotiations so we must decline your request to bargain this issue.
>
> If, however, you wish to meet to express your opinions and views of the no-smoking policy, we will set up such a meeting at your request.

The management-rights clause in the collective-bargaining agreement in effect at the time, Joint Exhibit 4 at pages 7 and 8, reads, as here pertinent, as follows:

> The Company shall have the exclusive rights, among others . . . to establish and from time to time to amend rules and regulations not inconsistent herewith . . . . All factory rules and regulations now in force shall remain in effect until amended or superseded. The Union will be notified in advance of any change in existing factory rules and regulations. The Union will be notified no less than thirty (30) calendar days in advance of any change in existing factory rules and regulations contained in the Hoover Hourly Employees Handbook.[3]

On March 30, 1990, Thomas Sack, Respondent's manager of labor relations, forwarded a letter to Repace indicating that the no-smoking rule would go into effect on June 11, 1990.

On April 9, 1990, company and union representatives met with respect to the no-smoking rule. When the Union tried to propose designated smoking areas, Respondent refused to discuss the subject.

On April 17, 1990, Repace filed a grievance on behalf of the Union asserting that ''[s]aid change in Rule 22 is unreasonable, restrictive and unnecessary.'' (Jt. Exh. 7.) It was discussed at a grievance meeting on April 25, 1990, with the union representative asking the company representative if they could negotiate the policy and the Company refusing.

On June 7, 1990, the Union filed a complaint and a motion for temporary restraining order and preliminary injunction (R. Exhs. 12 and 13, respectively), with the United States District Court, Northern District of Ohio, Eastern Division,[4] requesting that the court restrain Hoover, pending the resolution of the above-described grievance in the arbitration process, from implementing a rule which prohibits smoking within the company premises, except parking lots. It was agreed by the parties that arbitration on the pending grievance would be expedited and the Company would not implement the no-smoking rule pending the arbitrator's decision. The Union withdrew its action without prejudice at its own cost (R. Exh. 14).

On September 4, 1990, the arbitrator, relying on the management-rights clause, found for the Respondent. (Jt. Exh. 8.)

On September 9, 1990, Respondent implemented the above-described no-smoking rule. (Jt. Exh. 6, pp. 20 and 29.)

## Contentions

On brief, General Counsel contends that the privilege of smoking was a condition of employment at the time the current collective-bargaining agreement was negotiated and, therefore, the implementation of the policy prohibiting smoking by employees in any area of Respondent's facility must be a mandatory subject of bargaining; that the Board in *Johnson-Bateman Co.*, 295 NLRB 180 (1989), found that the management-rights clause involved in that case, which included the right to, among other things, ''issue, enforce and change Company rules,'' was not a waiver by the union involved there of its right to bargain about the employer's implementation of drug/alcohol testing requirements; that for there to be a waiver the Board requires a showing that the issues were fully discussed and consciously explored during negotiations and that the Union conspicuously yielded or clearly and unmistakably waived its interest in the matter; that the language of the involved management-rights clause does demonstrate that the Union intended to waive its rights to bargain over all rule changes; that during the 1983 negotiations the Union advised the Respondent that the reason for the 30 days' notice to the union provision was to give it an opportunity to negotiate a proposed rule; that during the 1988 negotiations the Union specifically reserved its right to bargain over any proposed no-smoking rule for unit employees; that since the Board, in *Bath Iron Works Corp.*, 302 NLRB 898 (1991), held that only changes which are deemed ''material, substantial or significant changes'' trigger a duty to bargain under the Act, the Union did not waive its right to bargain by not requesting to bargain when Respondent relocated or otherwise changed a prohibited smoking area in the past; that even if the Union acquiesced in Respondent's previous implementation of plant rules, the Board has held that a right once waived is not lost forever; that any claim

RULE #22

No smoking within company premises. (Except parking lots)
1st OFFENSE—Warning.
2nd OFFENSE—Warning.
3rd OFFENSE—One Week's Suspension.
4th OFFENSE—Discharge

[3] In 1981 the Union filed a grievance and an unfair labor practice with the Board concerning the Company's right to unilaterally implement and amend work rules. The involved Regional Director of the Board declined to issue a complaint based on his determination that further proceedings on the charge should be administratively deferred for arbitration under the *Collyer Insulated Wire*, 192 NLRB 837 (1971), revised guidelines. Jt. Exh. 10. The arbitrator handling that grievance examined the management-rights clause, which had advance notice to the union language but did not at that time contain the 30 days' advance notice requirement, and the bargaining history and concluded that the Company did have the right unilaterally to change the rules set forth in the hourly employee handbook. The Board did not take any further action regarding the 1981 unfair labor practice charge. During the 1983 negotiations, the Company and the Union negotiated with respect to, among other things, the right of the Company to unilaterally implement and amend work rules, and it was agreed that the Company would maintain its right to unilaterally establish and from time to time amend rules and regulations and the Union would be given 30 days' notice of any such change.

[4] Case 5:90CV1036.

that the Union's request to bargain was not timely is specious and without merit; that the Board should not defer to the arbitrator's decision in this case because the arbitrator was not presented with the general facts necessary to resolve the unfair labor practice; that the issue before the arbitrator was the reasonableness of the no-smoking rule and he determined that the no-smoking rule was a reasonable rule permitted by the management-rights clause; that while the arbitration proceedings were fair and regular and all the parties agreed to be bound by the arbitrator's award, he did not decide whether Respondent, by refusing to bargain and by taking unilateral action, violated Section 8(a)(1) and (5) of the Act, which requires a determination of whether the Union has waived its statutory right to bargain about the no-smoking rule; that the issue of waiver was not presented to or considered by the arbitrator; that the arbitrator interpreted the management-rights clause in light of a 1982 arbitration clause and the 30-day notice provision was added to the management-rights clause because of the 1982 arbitration award; that deferral is inappropriate since the arbitrator was not presented with the facts relevant to resolving the unfair labor practice; and that, accordingly, the arbitrator's award is ''palpably wrong'' and it is inconsistent with fundamental Board and court concepts of waiver and thus repugnant to the Act.

Respondent, on brief, argues that the Company's right to adopt and amend work rules pursuant to the labor agreement between the parties, as decided by the arbitrator in September 1990, meets the *Speilberg Mfg. Co.*, 112 NLRB 1080 (1955), *Olin Corp.*, 268 NLRB 573 (1984), standard for postarbitration deferral, and therefore, this matter should be deferred to the arbitrator's decision; that a prerequisite to ruling upon the reasonableness of rule 22 was a finding by the arbitrator that in fact the Company had the unilateral right to implement new or revised work rules; that, therefore, one of the contractual issues before the arbitrator, namely, whether the Company had the unilateral right to implement and revise work rules, is factually parallel to the unfair labor practice issue of whether the Union waived its right to bargain concerning same; that the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice; that with respect to the repugnancy standard, the arbitrator's conclusions, though perhaps different from what the Board would have concluded de novo, is reasonably based on the express language of the labor agreement and the bargaining history between the parties, and the arbitrator's award is not clearly repugnant to the Act; that The Hoover Company did not violate the Act when it unilaterally implemented revised Rule 22, since the Union clearly and unmistakably waived its statutory right to bargain such matters; that there is express waiver based on the language of the labor agreement in that the management-rights clause does contain the requisite specificity for a waiver of the right to bargain over the implementation of new work rules or the revision of existing work rules; that there is implied waiver based on the bargaining history between the parties; that the Union attempted to remove the right of the Company to unilaterally establish and amend work rules during the labor negotiations in 1968, 1980, and 1983 and the Union clearly understood the meaning of the management-rights clause when it agreed to this provision during the 1986 and 1988 negotiations; and that the Union waived its rights by action or inaction in that it obtained the relief requested in the Federal court proceedings and, therefore, its dismissal of the Federal court action constitutes a waiver of its right to bargain or to dispute the Company's unilateral right to implement new or revised work rules.

## Analysis

Before getting to the merits, a procedural matter must be treated. General Counsel has filed a motion to strike portions of Respondent's brief contending that the 13 challenged portions are in no way supported by the record and are clearly prejudicial to General Counsel. The Charging Party joins in the motion. In reply, Respondent assets that the first 11 challenged items relate to the genesis of the no-smoking rule and were provided by way of background; that many of the matters are expressly referenced or referred to in General Counsel's Exhibit 2, the Revised Implementation Schedule for Factory No-Smoking Policy, and Joint Exhibit 8, the above-described 1990 arbitration award; that regarding the last two challenged items, General Counsel's objection is based strictly on semantics in that it is accurate that the court did refuse to issue a temporary restraining order and that since Cook agreed to the proposal to have the Company delay the implementation of the involved rule, he did represent the Company in the Federal court proceedings by binding it to a settlement agreement which ultimately resulted in an expedited arbitration hearing; that General Counsel does not refute the validity or accuracy of the challenged statements; and that General Counsel's statement that the challenged statements are in no way supported by the record is inaccurate and, therefore, the motion should be denied. Some of the challenged items are referred to in the record. The remainder will be treated as argument and not proposed findings of fact. Accordingly, the motion to strike will be denied.

Whether The Hoover Company has the right to unilaterally change certain of its work rules under the terms of its management-rights clause has been decided by two arbitrators, both of whom found in favor of the Company on this point. As noted above, the Board made a prearbitration deferral under *Collyer* with respect to the first arbitrator. Here the Board is being requested by Respondent to make a postarbitration deferral under *Olin.*

In his award, dated January 5, 1982, Arbitrator Strasshofer, as here pertinent, made the following findings:

> The arbitrator finds that the company did have the right unilaterally to change the rules set forth in the Hoover Hourly Employee's Handbook effective June 15, 1981. Although a strenuous effort was made by the Union to show the gradual development of an alleged past practice by which the parties would negotiate rules changes, the arbitrator finds that that effort fell far short of its goal. The language of the management-rights clause is very clear in granting to the company the right ''to establish and from time to time amend rules and regulations not inconsistent herewith, and to maintain the efficiency of its working forces. . . .'' That language has remained in effect for many years. In 1966 the union was able to negotiate an additional provision in the management-rights clause to provide that the union would be notified in advance of any change in existing factory rules and regulations. There is no argu-

> ment that the union has been notified of changes, although it has not in all instances been given sufficient opportunity to comment on the changes prior to their implementation.
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> The union's attempt in 1980 to negotiate a basic change with respect to the company's right to revise and amend the rule book demonstrates its uncertainty as to any alleged right to force the negotiation of changes, and its present argument that the rule book is a ''subagreement.''
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> The lengthy testimony concerning the discussions about rule changes which more or less coincide with the negotiations of a new contract establishes, on balance, that the company representatives made an almost completely consistent effort to distinguish the discussion of rule changes from the negotiation of contract clauses. In fact, the union eventually withdrew its demand to change the express language of the management-rights clause, although it has persevered in efforts to discuss various specific rules which it believes need clarification or revision. The testimony indicated that the company has attempted to accommodate those suggestions, but it never felt itself obligated to negotiate any such suggestions.

As noted above, on brief General Counsel, in the context involved herein, challenges the award of the second arbitrator, Nathan Lipson, because he interpreted the management-rights clause in the light of the 1982 award. Assertedly, since the 30-day provision was added to the management-rights clause because of the 1982 arbitration award, the deferral herein is inappropriate as arbitrator Lipson was not presented with the facts relevant to resolving the unfair labor practice. The 30-day provision has no real effect on the 1982 award. Before that, the Company was required to give advance notice to the Union. But as arbitrator Strasshofer noted, ''the union has been notified of changes, although it has perhaps not in all instances been given sufficient opportunity to comment on the changes prior to their implementation.'' The 30-day notice period accords the Union sufficient time to comment. It was not shown herein that it accomplishes anything else.

Arbitrator Lipson, in his September 1990 award, made, as here pertinent, the following findings:

> The Union has processed the instant grievance on the basis that since it is the ''sole collective bargaining agency'' for the production and maintenance employees bargaining unit, the Company was obligated to negotiate any Rule #22 change. However, a reading of Section 18 [the management-rights clause] does not support said position. Indeed, the Company has specifically bargained ''the exclusive rights, among others—to establish and from time to time to amend rules and regulations not inconsistent'' with the collective bargaining agreement. Further, it has been agreed that changes ''in existing factory rules and regulations contained in the Hoover Hourly Employees Handbook'' may be effected provided that the Union receives thirty calendar days notice.
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> Any doubt on this score is removed by the Award and Opinion of Arbitrator Strasshofer [who] having considered contract language identical to present Section 18, except for the [30 day] notice requirement, held that ''the Company did have the right unilaterally to change the rules set forth in the Hoover Hourly Handbook.''
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> Nor can the right to smoke in the plants be viewed as a protected practice or working condition. For years smoking has been governed by the Hoover Hourly Employees Handbook. Since smoking is not addressed in the collective bargaining agreement, it must again be said that by the terms of Section 18, the Company has reserved the general right to control employee smoking on its properties.
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> . . . .
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> . . . given the evidence presented by the parties and the language of Section 18, it must be concluded that the Union did not meet its burden of showing that the new Rule #22 is unreasonable.

A majority of the Board in *Motor Convoy*, 303 NLRB 135, 136, 137 (1991), concluded, as here pertinent, as follows:

> The Board will defer to an arbitration award when the proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). Additionally, the arbitrator must have considered the unfair labor practice issue which is before the Board. *Raytheon Co.*, 140 NLRB 883 (1963). In *Olin Corp.*, 268 NLRB 573, 574 (1984), the Board clarified that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. The Board will find deferral inappropriate under the clearly repugnant standard only when the arbitrator's award is '''palpably wrong,' i.e., . . . is not susceptible to an interpretation consistent with the Act.'' Ibid. The party seeking to have the Board reject deferral bears the burden of proof. Ibid.
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> In determining repugnancy, the Board will weigh the difference, if any, between the contractual standard used by the Board. *Olin*, supra at 574.
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> The test under *Olin* . . . is whether the arbitral opinion is *susceptible to an interpretation* consistent with the Act.
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> Thus, for example, if an arbitrator upholds an employer's argument that its actions were justified by a contractual management-rights clause, the Board, in an 8(a)(5) unilateral change case, would defer to the award, even if neither the award nor the clause read in terms of the statutory standard of clear and unmistakable waiver. The award is susceptible to the interpretation that there was such a waiver, even though the contract and the award do not read in these terms.
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> . . . .

> In *Dennison National Co.*, 296 NLRB 169 (1989), an arbitrator found that, under the contract's management-rights clause, an employer was privileged to make a unilateral change. The General Counsel argued that the award was repugnant because the arbitrator failed to use the statutory standard of whether the management-rights clause clearly and unmistakably waived the right to bargain. In spite of the difference in the standards, the Board deferred.

General Counsel concedes that the involved 1990 arbitration proceedings were fair and regular and that the parties agreed to be bound by the arbitrator's award. Based on the Board's conclusions in *Motor Convoy*, the involved 1990 arbitration award is not repugnant to the Act.

## CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce as alleged.
2. The Union is a labor organization as alleged.
3. Respondent did not violate the Act as alleged.
4. The complaint will, therefore, be dismissed in its entirety.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

## ORDER

I recommend that the complaint herein be dismissed in its entirety.

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[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.